

**BEFORE THE  
RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

Case No. R-1986

CECILIO G. LITUCO  
632 East 78<sup>th</sup> Street  
Los Angeles, CA 90001

**DECISION AND ORDER**

The attached proposed Decision of the Administrative Law Judge is hereby adopted  
by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the  
above entitled matter.

This Decision shall become effective on May 29, 2006

It is so ORDERED May 22, 2006



LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

BEFORE THE  
RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

CECILIO G. LITUCO,

Respiratory Care Practitioner License No. 21925,

Respondent.

Case No. R-1986

OAH No. L2005110147

**PROPOSED DECISION**

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on March 29 and 30, 2006.

Edward K. Kim, Deputy Attorney General, represented Stephanie Nunez, Executive Officer, Respiratory Care Board, Department of Consumer Affairs of the State of California (complainant).

Cecilio G. Lituco (respondent) appeared and represented himself.

The parties offered documents and sworn testimony, and argued the case.

On March 29, 2006, counsel for complainant moved to amend paragraph 14 on page 4 of the Accusation and Petition to Revoke Probation by strike-out and interlineations (i.e., by adding dates on which respondent failed to comply with the terms of his probation). There being no objection from respondent to the proposed changes, the Administrative Law Judge approved the amendment. Counsel for complainant then moved to further amend the Accusation and Petition to Revoke Probation by adding two new causes to revoke probation. The Administrative Law Judge left the record open through April 7, 2006, for complainant to file and serve a First Amended Accusation and Petition to Revoke Probation, and through April 14, 2006, for respondent to file and serve any objection to the filing of the First Amended Accusation and Petition to Revoke Probation and/or to request that the matter be continued for the taking of additional evidence.

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Complainant filed and served the First Amended Accusation and Petition to Revoke Probation No. R-1986 on April 6, 2006. There being no objection or other response from respondent, the First Amended Accusation and Petition to Revoke Probation, which superseded the Accusation and Petition to Revoke Probation in its entirety, was added as part of complainant's exhibit 1 for jurisdictional purposes only. The record was closed and the matter deemed submitted on April 14, 2006.

#### FINDINGS OF FACT

1. The Administrative Law Judge takes official notice that complainant filed the First Amended Accusation and Petition to Revoke Probation in her official capacity.

2. On June 11, 2001, the Respiratory Care Board (board) issued Respiratory Care Practitioner License No. 21925 to respondent. The license is current and valid and is due to expire on February 28, 2007.

3. On July 26, 2004, the board filed Accusation No. R-1924 against respondent. The Accusation charged and alleged that respondent had violated the Respiratory Care Practice Act (Bus. & Prof. Code, § 3700 et seq.) in that he had possessed and used a controlled substance.

The basis for the charges and allegations in the accusation were that in December 2003, respondent was arrested and charged with possession of methamphetamine and possession of paraphernalia (a pipe) which he used to smoke methamphetamine.<sup>1</sup> On January 12, 2004, in the Superior Court of California, County of Riverside, in Case No. SWM023711, *People v. Cecilio Gomez Lituco*, the court convicted respondent on a plea of guilty of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, and Health and Safety Code section 11364, possession of drug paraphernalia, both misdemeanor offenses.

The court deferred entry of judgment, placed respondent on a drug diversion program for 18 months, and ordered him to pay fines of \$365.

4. On December 8, 2004, the board issued its Decision in Accusation No. R-1924 by adopting a Stipulated Settlement and Disciplinary Order entered into by complainant and respondent. Pursuant to the Stipulated Settlement and Disciplinary Order, which became effective on December 20, 2004, respondent admitted the truth of each and every charge and allegation in the Accusation and agreed to the Disciplinary Order, which stayed revocation of his Respiratory Care Practitioner's license and placed him on probation for three (3) years. Respondent was required to comply with terms and conditions of probation which included, but were not limited to the following:

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<sup>1</sup> Methamphetamine, a derivative of amphetamine, is a powerful stimulant that affects the central nervous system.

## Probation Condition 2.

BIOLOGICAL FLUID TESTING Respondent, at his expense, shall participate in random testing, including, but not limited to, biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, or a drug screening program approved by the Board. Test costs range from \$21.00 to \$200.00 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board.

At all times, Respondent shall fully cooperate with the Board or any of its representatives, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time Respondent provides a specimen acceptable to the Board.

Failure to submit to testing or appear as requested by any Board representative for testing, as directed shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

## Probation Condition 3.

ABSTENTION FROM USE OF DRUGS OR ALCOHOL Respondent shall completely abstain from the possession or use of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health records. Respondent shall also provide information of treating physicians, counselors or any other treating professionals as requested by the Board.

Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of Respondent's employers.

Probation Condition 5.

OBEY ALL LAWS Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California.

Respondent shall notify the Board in writing within 14 days of any incident resulting in his arrest, or charges filed against, or a citation issued against Respondent.

Probation Condition 6.

QUARTERLY REPORTS Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th. For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th. For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th. For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

Probation Condition 7.

PROBATION MONITORING PROGRAM Respondent shall comply with requirements of the Board appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed.

Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative.

Respondent is encouraged to contact the Board's Probation Program at any time he has a question or concern regarding his/her terms and conditions of probation.



Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Probation Condition 15.

**VIOLATION OF PROBATION** If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against Respondent.

5. Pursuant to the Stipulated Settlement and Disciplinary Order, respondent was also required to reimburse the board for its probation monitoring costs (Probation Condition 8) and the costs of investigation and prosecution of Accusation No. R-1924 (Probation Condition 12). Accordingly, respondent was to make payments of \$100 per month for his probation monitoring costs, and pay cost recovery, in the sum of \$1,638. Cost recovery was to be paid in full, directly to the board, in equal quarterly payments, within two years from the effective date of the board's Decision.

6. Kevin Masuda is the board's probation monitor assigned to oversee respondent's compliance with the terms and conditions of probation. During the hearing, Mr. Masuda's testimony and documentary evidence established that at the commencement of respondent's probation period, Mr. Masuda met with respondent to explain all the requirements of probation and, in particular, the drug and alcohol testing program that related to Probation Conditions 2 and 3. Respondent acknowledged that he understood each of the requirements and procedures related to the drug and alcohol testing program, and selected sites that he would report to for the collection of specimens when directed to do so by the board's vendor, Compass Vision, Incorporated (CVI).

Mr. Masuda advised respondent that he was available to answer questions at any time regarding compliance with the terms and conditions of probation. Respondent had no questions regarding Probation conditions 2 or 3.

7. CVI is under contract to provide drug and alcohol monitoring of probationers and to provide the board with the results of such monitoring. Under Probation Condition 2, respondent was required to call in to CVI's automated call-in system on a daily basis to learn if he must provide a specimen. When directed to provide a specimen, respondent was to report to one of the collection sites to provide the sample. Failure to call in to CVI, or failure to provide a sample when so directed by CVI, constituted a violation of probation.

CVI provided information to the board regarding respondent's program compliance through CVI's secure internet web site. As respondent's probation monitor, Mr. Masuda had password access to CVI's data base so that he could monitor respondent's call-in compliance, specimen collection notice compliance, and specimen testing results.

8. National Medical Services (NMS) is a full-service toxicology laboratory that is located in Willow Grove, Pennsylvania. NMS is under contract to provide analysis of specimens submitted by/through CVI. NMS maintains a detailed chain of custody for each specimen it receives, performs tests to identify and differentiate chemical components of specimens, and renders reports of testing results to CVI.

9. Based on reports the board accessed from CVI, which were incorporated in Mr. Masuda's probation monitoring reports for the periods February 8, 2005 through May 31, 2005 and June 1, 2005 through March 2, 2006, complainant established that respondent failed to call CVI, as required, on each of the following dates:

February 8, 2005 through February 14, 2005 (each day)  
February 20, 2005  
February 24, 2005  
March 9, 2005  
April 1, 2005  
April 7 through April 9, 2005 (each day)  
April 23, 2005  
April 26 through May 22, 2005 (each day)  
June 1, 2005 through December 31, 2005 (each day)  
January 1, 2006 through March 2, 2006 (each day)

10. Based on reports the board accessed from CVI, which were incorporated in Mr. Masuda's probation monitoring reports for the periods February 8, 2005 through May 31, 2005 and June 1, 2005 through March 2, 2006, complainant established that respondent failed to report to a collection site and provide a specimen, as directed by CVI, on each of the following dates:

February 28, 2005  
April 1, 2005  
April 6, 2005  
April 25, 2005  
May 2, 2005  
June 10, 2005  
September 9, 2005  
November 17, 2005  
December 27, 2005  
January 5, 2006  
February 17, 2006

11. On April 20, 2005, respondent completed a "Drug Questionnaire" that he provided to the board. In the report, respondent was to identify any drugs or alcohol that he used. In completing the questionnaire, respondent informed the board that during February and March 2005, on occasion he had consumed two bottles of Corona beer.

12. Based on reports the board accessed from CVI, which were incorporated in the board's probation monitoring report for the period February 8, 2005 through May 31, 2005, on two days during that period, respondent had called in to CVI and CVI directed him to provide a urine specimen at a collection site. Respondent's specimens were subsequently evaluated by NMS. The specimens tested positive for amphetamine and methamphetamine, as follows:

Date/Time of Specimen Collection: March 11, 2005 / 22:30  
Basic Medical Urine Panel Result:<sup>2</sup> Positive for amphetamines  
Confirmation Test Result:<sup>3</sup> Positive for amphetamine (620 ng/ml<sup>4</sup>)  
Positive for methamphetamine (>5000 ng/ml)  
D/L Methamphetamine Ratio:<sup>5</sup> 29

Date/Time of Specimen Collection: April 8, 2005 / 10:50 p.m.  
Basic Medical Urine Panel Result: Positive for amphetamines  
Confirmation Test Result: Positive for amphetamine (1600 ng/ml)  
Positive for methamphetamine (4800 ng/ml)  
D/L Methamphetamine Ratio: 32

13. Respondent failed to provide the board with quarterly reports, as required, for the following reporting periods (reports were to be submitted to the board within seven days after the end of the reporting period):

July 1, 2005 through September 30, 2005  
October 1, 2005 through December 31, 2005

14. Based on employment records received from respondent's employer, complainant established that respondent was on duty at Little Company of Mary Hospital in Torrance, California, from 6:07 p.m. on March 11, 2005 through 6:27 a.m. on March 12, 2005, a period during which respondent provided a urine specimen sample that tested positive for amphetamine/methamphetamine.

<sup>2</sup> Basic Medical Urine Panel results are based on enzyme immunoassay, enzymatic assay and colorimetry analyses of the urine specimen. The panel is a screening test for large classes of chemical compounds. Positive results are further analyzed to confirm findings.

<sup>3</sup> Confirmation Test results are based on gas chromatography and gas chromatograph/mass spectrometry analyses of the urine specimen. This test is used to confirm results derived from the basic medical urine panel with a high degree of certainty.

<sup>4</sup> ng/mL is the abbreviation for nanograms per milliliter.

<sup>5</sup> If the D/L methamphetamine ratio is greater than 0.13, the methamphetamine found is probably the result of the use of the Drug Enforcement Agency Schedule II central nervous system stimulant (d-methamphetamine). The decimal is omitted in the reported ratio.



15. John Treuting, Ph.D., is a forensic and clinical toxicologist who currently works as a consulting toxicologist. His doctoral dissertation was on the acute toxicological affects of methamphetamine. Since 2004 he has been a consulting toxicologist for NMS and has testified in 50 to 75 cases regarding the toxicological effects of drugs in numerous court cases. In the past, he has testified on behalf of both plaintiffs and defendants.

Dr. Treuting opined that the effects of methamphetamine are of particular concern when the illicit drug is used by healthcare providers. Since the stimulative effects of methamphetamine include decreased attention span, inability to focus on a particular task for very long, difficulties with multi-tasking, and impaired judgment, its use by a healthcare provider would put his or her patients at risk.

16. Dr. Treuting testified that respondent's March 11, 2005, test results, which were positive for methamphetamine at a level greater than 5000 ng/mL, represents a "fairly significant level," especially since the original dose and time of introduction into respondent's body is not known (i.e., the longer the gap in time between introduction of the drug and specimen collection, the higher the dosage would have been needed to obtain the same test result).

17. Respondent is 37 years old, separated from his wife, and has three children. Although respondent testified that there are no court orders requiring that he pay child support for any of his offspring, respondent provides financial support to each child to the extent that he can.

Respondent last worked as a respiratory care practitioner in 2005 at Little Company of Mary Hospital. He is currently not working, and is receiving unemployment payments. Although respondent wants to go back to work, he testified that given his past conduct, it is hard to find a job. Respondent claimed his past conduct had nothing to do with patient care. He had not received any complaints as a respiratory care practitioner and wants another chance, but realizes that he must first deal with his drug use.

18. Respondent failed to provide any outside verification of rehabilitation. He brought no supporting witnesses, declarations or letters of reference regarding his character.

19. The reasonable costs of investigation and prosecution incurred by the board in this matter is the total sum of \$7,177.25.

## LEGAL CONCLUSIONS

1. The Board has jurisdiction to proceed in this matter, pursuant to Business and Professions Code sections 3710, 3718, 3750 and 3750.5. (Factual Findings 1 and 2.)

2. The standard of proof in this proceeding is "clear and convincing evidence to a reasonable certainty," meaning that complainant is obliged to adduce evidence that is clear,

explicit, and unequivocal – so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*Ettinger v. Bd. of Med. Quality Assurance* (1982) 135 Cal.App.3d 853; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4<sup>th</sup> 1889, 1893; *In Re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

3. Business and Professions Code section 3750, subdivision (g), provides that the board may discipline a license if the licensee violates any provision of the Respiratory Care Practice Act.

4. Business and Professions Code section 3750.5 states, in pertinent part:

[T]he board may deny, suspend, or revoke the license of any applicant or licenseholder who has done any of the following:

(a) Obtained or possessed in violation of law, or except as directed by a licensed physician and surgeon, dentist, or podiatrist administered to himself or herself, or furnished or administered to another, any controlled substances

.....

(b) Used any controlled substance . . . or any dangerous drug . . .

5. Business and Professions Code section 3753.5, subdivision (a), states, in pertinent part:

In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case.

6. Business and Professions Code section 3753.7, subdivision (a), provides that for purposes of the Respiratory Care Practice Act, “costs of prosecution shall include attorney general or other prosecuting attorney fees, expert witness fees, and other administrative, filing, and service fees.”

7. Pursuant to the Disciplinary Guidelines of the Respiratory Care Board, March 2002 Edition, evidence in aggravation of penalty applicable to this matter includes the following:

- Patient's trust, health, safety or well-being was jeopardized.
- History of prior discipline.
- Patterned behavior: Respondent has a history of one or more violations or convictions related to the current violation(s).
- Violation of Board Probation.
- Failure to provide a specimen for testing in violation of terms and conditions of probation.

8. Complainant established by clear and convincing evidence to a reasonable certainty that respondent's probation is subject to revocation because he failed to comply with Probation Condition 2. (Factual Findings 4 through 10.)

9. Complainant established by clear and convincing evidence to a reasonable certainty that respondent's probation is subject to revocation because he failed to comply with Probation Condition 3. (Factual Findings 4, 6, 8, 11, 12, 15, and 16.)

10. Complainant established by clear and convincing evidence to a reasonable certainty that respondent's probation is subject to revocation because he failed to comply with Probation Condition 5. (Factual Findings 4, 6 and 12.)

11. Complainant established by clear and convincing evidence to a reasonable certainty that respondent's probation is subject to revocation because he failed to comply with Probation Condition 6. (Factual Findings 4, 6, and 13.)

12. Complainant established by clear and convincing evidence to a reasonable certainty that respondent's probation is subject to revocation because he failed to comply with Probation Condition 7. (Factual Findings 4, 6, 8, 11, 12, 13, 15, and 16.)

13. Complainant established by clear and convincing evidence to a reasonable certainty that respondent is subject to disciplinary action under Business and Professions Code sections 3750, subdivision (g), and 3750.5, subdivision (a)(b), and as provided for in Probation Condition 15. (Factual Findings 4, 6, 8, 12, and 16; Legal Conclusions 2 and 3.)

14. Given the entire record in this matter, respondent's continued licensure will be adverse to the public health, safety and welfare.

15. The Board is entitled to recover from respondent its reasonably incurred costs of investigation and prosecution of this matter. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.App.4th 32, 45, the Board must consider, among other things, the licensee's ability to make payment. Based on this principle, it is found that it would be unduly punitive to assess respondent with the entirety of the board's costs of investigation and prosecution if his license is revoked. Rather, it is found that, in light of respondent's unemployment and proposed license revocation, any repayment of the reasonable costs of investigation and enforcement, which total \$7,177.25 should be deferred and made a condition of license reinstatement or the issuance of a new license to respondent.

#### ORDER


WHEREFORE, THE FOLLOWING ORDER is hereby made:

The probation of respondent in Respiratory Care Board Case No. R-1924 is hereby revoked and the disciplinary order of license revocation is carried out.

Respiratory Care Practitioner License No. 21925, issued to respondent Cecilio G. Lituco is hereby revoked.

If and when respondent Cecilio G. Lituco applies for reinstatement of his Respiratory Care Practitioner License, as a condition of license reinstatement or issuance of a new license, respondent shall pay to the Respiratory Care Board the costs associated with its investigation and enforcement of this matter, in the amount of \$7,177.25, at such time and in such manner as the Respiratory Care Board, in its discretion, may direct. Respondent shall be permitted to pay these costs in a payment plan approved by the board. Nothing herein shall be construed to prohibit the board from reducing the amount of cost recovery upon reinstatement of the license or the issuance of a new license.

DATE: April 19, 2006.

  
ROBERT S. EISMAN  
Administrative Law Judge  
Office of Administrative Hearings